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PATTERNS OF DEMOCRACY IN THE CASE LAW OF THE EU COURT OF JUSTICE AND THE EUROPEAN COURT OF HUMAN RIGHTS

Abstract:
This article attempts to discover the key elements of the democratic principle, as described by the judges sitting in Luxembourg and Strasbourg, whose case law reveals the underlying idea of democracy at the supranational level. Until recently the debate on democracy was limited to the national level. But things are changing, and this article shows the gradual emergence of a process led by supranational courts, in which the application of the democratic principle finds multiple grades and variations. In this way the supranational/international courts have opened a new chapter in the process of constitutionalization of international law.

Keywords: CJEU, democracy, European Union, Court of Justice of the European Union, European Convention on Human Rights, European Court of Human Rights

INTRODUCTION

Comparing the contributions of the Court of Justice of European Union (CJEU) and of the European Court of Human Rights (ECtHR) to the shaping of the concept of democracy is at one and the same time an obvious and challenging task. It seems obvious insofar as the two Courts belong to legal systems which can rightly be considered to be very closely related, both from the geo-political and cultural viewpoints. It is not only the overlap existing between the Member States of the European Union (EU) and the contracting parties of the European Convention of Human Rights (ECHR) that make this similarity evident, but also certain core legal principles common to the basic instruments of the two legal systems under consideration. One must not forget that the founding Treaties of the EU (in their most recent version, as consolidated after the

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entry into force of the 2007 Lisbon Treaty) and the ECHR, while using different formulas both pursue the same objective, namely to establish and promote closer integration between European states and their peoples,[1] and that both instruments proclaim the principle of democracy as one of the basic tenets of this integration process.[2]

Having thus noted the common values shared by the EU Treaties and the ECHR, it is also common knowledge that the two legal systems also reflect major differences in both their institutional and operational solutions, with the consequence that any analysis concerning the ways and means through which the above objectives are developed becomes not only challenging from a methodological point of view, but also highly indeterminate and precarious in terms of its outcomes. This is due above all to the fact that while the European Union stands out as a "special case" of a supranational integration organization, the ECHR by and large reflects the classic model of a conventional arrangement concluded between states. Without further examining this topic in detail, it is necessary and sufficient to point out that this difference is confirmed by the fact that the domestic legal orders involved generally distinguish adaptation to the EU system from adaptation to the convention system of the ECHR.

There is no denying that this major difference in the institutional and normative solutions which distinguish the two legal systems also has a significant impact on the functioning and the role of the judicial bodies established in their respective basic instruments, and consequently also on the different contributions of these organs to the elaboration and development of the democratic principle. Generally speaking it may be said that the CJEU has often been called upon to consider the implications of the democratic principle as applied in the internal, institutional setting of the EU and is mainly concerned with the task of guaranteeing the proper institutional balance between the EU institutions and the "democratic" participation in the decision-making processes of the Union. Conversely the ECtHR, consistent with its mandate as a judicial body entrusted with the protection of fundamental rights, has been more concerned in its case law with the "individual" dimension of the problem, that is to say with evaluating the impact the democratic principle may have in both enhancing and/or limiting the fundamental rights of individuals. Without undermining this initial and broad generalization, we should however also acknowledge that some kind of convergence between the two Courts with respect to the democratic principle can be observed, and while this does not necessarily lead to the identification of shared patterns, nonetheless some common path in this direction can be discerned.

The purpose of this article is therefore to verify whether, and to what extent, it may be possible to single out some elements revealing the idea (or ideas) of democracy in the case law of the CJEU and the ECtHR, and whether the contributions of these two judicial bodies in this field can be considered – despite the clear differences in their

[1] In this respect, compare the first paragraph of the Preamble and Art. 1 of the Treaty on the European Union (TEU) and the third paragraph of the Preamble of the ECHR.

[2] In this respect, compare the fourth paragraph of the Preamble and Art. 2 of the TEU and the fourth paragraph of the Preamble of the ECHR.

respective roles and functioning – as somehow complementary with respect to the ideal expressed in the preambles of both founding treaties. In other words, can it be said that these two systems are both contributing – each in its own special way – to maintaining and enhancing the democratic feature of the European region? In affirmatively answering this question, it will be suggested herein that the differences which still exist can be attributed more to the limitations affecting the nature and function of supranational courts in assessing and applying the democratic principle than to "structural" diversities arising from the institutional frameworks in which they operate.

1. THE LUXEMBOURG COURT AND THE DEMOCRATIC PRINCIPLE

1.1. Historical and methodological premises

According to the words of a noted Advocate General, "[s]hocking though it may seem, the Community was never intended to be a democratic organization".[3] In fact the international origin of the European Community was such that the issue of democracy was not written into its early political agenda. Nevertheless, this question emerged progressively along with the evolution of the Community structure and, above all, out of the affirmation of the role of the European Parliament.

Actually, from the moment that a parliamentary institution was foreseen in this unique type of international organization the issue of democracy – or, perhaps better put, of a "democratic deficit" – has emerged. Indeed, from the day that David Marquand coined the expression "democratic deficit"[4] the amount of ink spilled on this topic has confirmed the desire, if not need, to implement the democratic character of

[3] F. Mancini, *Democracy and the European Court of Justice*, in: F. Mancini (ed.), *Democracy and Constitutionalism in the European Union*, Hart Publishing, Oxford: 2000, p. 31. According to Mancini, proof of this can be easily found in the preamble and in the first part of the founding Treaties, in which the word democracy is not even mentioned, and where instead peace and freedom find a place as values to be defended. What seems even more surprising is that the constituents do not concern themselves with (expressly) reserving the admission of new states to the democratic principle, by which "any state" is spoken of generically (Art. 237 EC Treaty). E. Stein, in *Thoughts from a Bridge: A Retrospective of Writings on New Europe and American Federalism*, The University of Michigan Press, Ann Arbor: 2000, p. 340, also observes that "[i]n 1950, the European Coal and Steel Community was conceived as a technocrat regime: the so-called Common Assembly was added by Jean Monnet as an afterthought at the urging of the Dutch and others." On the same note, P. Craig, G. De Burca, *The Evolution of EU Law*, Oxford University Press, Oxford: 1999, p. 7, underline that at the beginning "[d]emocracy was, by way of contrast, a secondary consideration in a double sense. This was in part because it was felt that the best, perhaps only, way of securing the desired peace and prosperity was by technocratic elite-led guidance. It was in part because even when the attention was focused on the 'people' the notion of democracy was limited or attenuated. The essence of the discussion was on the way in which the success of the European enterprise would lead to a transfer of loyalty to and acceptance of the Community institutions. It was not directed towards the fundamental issue of whether democratic controls in the more normal sense of the term should form an important part of the Community order."

[4] D. Marquand, *Parliament for Europe*, J Cape, London: 1979, p. 64.

the Community's system of governance. At the same time, this incisive definition used by Marquand has, from the very beginning, at least partly confused the issue in dispute, suggesting that it could be solved in terms of, one might say, "quantities". Thus, in a certain sense it is assumed that "more" democracy will suffice to overcome its deficit.

Not surprisingly, this incremental or quantitative method has also characterized much of the CJEU case law which, by injecting consecutive doses of democracy in the EU experiment, has fuelled a debate at the supranational level that still fascinates and puzzles the scholars in this field. It has also provided support for the thesis of a famous scholar of democracy, according to whom "... except for the European Union no transnational structures exist with even the semblance of a democratic process."[5]

In this context it is not possible to offer a complete picture of the extensive case law on the matter at hand; which is, in fact, not always the key element in the Court's decisions. Instead we attempt to identify the essence of the major strands around which the CJEU has established, over time, its case-law on the topic of democracy.

Before entering into the merits of the issue, a methodological note is necessary at this point: Even if the case law analysed in this work concerns the democracy of the EU system itself, the EU has always controlled the Member States' respect for EU founding values,[6] both at the moment of their accession (Art. 49 TEU) and during their membership (Art. 7 TEU). Art. 49 TEU requires that a state, in order to apply to become a Member State of the EU, "respects the values referred to in Article 2 and is committed to promoting them." Art. 7 TEU provides a prevention mechanism and remedial action which permits the EU to question a state's membership in the event of a clear risk, or a serious and persistent breach, of fundamental EU values by a Member State.

However, the mechanism provided for in Art. 7 TEU is of a highly political nature, as it starts from "a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission" and the final decision is taken by the Council acting by a qualified majority, after obtaining the consent of the European Parliament and hearing the Member State. It is not necessary here to analyse the entire structure of

[5] R.A. Dahl, *A Democratic Dilemma: System Effectiveness versus Citizen Participation*, 109(1) Political Science Quarterly 23 (1994), pp. 31-32.

[6] The democratic principle is a key element of these founding values, as is reflected in Art. 2 TEU: "[t]he Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail." The procedure for protecting these values was introduced by the Treaty of Amsterdam in 1997, as amended by the Nice Treaty of 2001 and Lisbon Treaty of 2007. As is well known, the first case of an alleged violation of the EU's fundamental values involved Austria, following Haider's election in 2000. The question recently recurred after Orban's election in 2011, questioning the alleged anti-democratic breakthrough of the Hungarian government. Many doubts have been raised about this kind of "nuclear bomb" mechanism and the European institutions themselves are planning to make some amendments to Art 7, as mentioned in the communication from the Commission to the European Parliament and the Council "A new EU framework to strengthen the rule of law" COM(2014) 158 final/2 19.3.2014.

this complex (overly complex, according to some scholars) procedure.[7] However, it is pertinent to note that these kinds of systemic violations, in which the democracy of a Member State is at risk, is not subject to any kind of legal or judicial intervention, but is instead entrusted to the political institutions and to their negotiations with the concerned state.

There is another second issue that must be kept clearly in mind: the protection of the democratic principle in the EU is strictly intertwined with the achievement of the EU fundamental principle, the so-called *favor integration* principle. As the legal scholars have consistently underlined, "our very concern with democracy and legitimacy cannot be considered in isolation from the integration forces which have generated and shaped the community."[8] In other words democracy, seen from a multi-level perspective, is *per se* different from democracy in a national order. The multi-level structure of the EU and the *favor integration* principle have led to a new democratization process, comparable only in a very general sense with that of the other existing forms of state. It is based on a double level of democracy – not only that of its Member States, but also, distinctly, that of the very European Union order.

Within this process the CJEU does not appear as just a simple "background actor" on the European political scene. On the contrary, it reveals itself as one of the engines of the EU constitutional evolution,[9] an engine that can exert its dynamism, often at the urge of the parliamentary body (or later of the legislative bodies *tout court*).

1.2. The case for democracy: The community decision-making process under scrutiny

1.2.1. First strand of the EU case law: Defence of the democratic principle through the maintenance of institutional balance

The heart of the Luxembourg Court's case law lies in protection of the correct legislative procedure in its multiple aspects and, by extension, guaranteeing of the role of the European Parliament as representing the peoples of Europe. This "parliamentizing" of the EU decision-making process has thus been the first step toward injecting

[7] On 1st June 2015, though, the European Commission adopted an Opinion concerning the rule of law in Poland (see http://europa.eu/rapid/press-release_IP-16-2015_en.htm): this could be a preliminary step for activating the Art. 7 TEU mechanism.

[8] Craig & De Burca, *supra* note 3, p. 50.

[9] This role of the CJEU (earlier the ECJ) is also part of the institutional balance we address herein: "[t]he traditional primacy of the legislative branch shall have to be abandoned. It is to be replaced by a system of checks and balances in which the ECJ shall have to offer vigorous resistance to the Union's legislative bodies through the device of constitutional review. This institutional resistance by the Court … is what will render EU legislation democratically legitimate in the eyes of European law subjects, and what will form the ECJ's own democratic foundation in its capacity as *Europe's Constitutional Court* as well." (Q.L. Hong, *Constitutional Review in the Mega-Leviathan: A Democratic Foundation for the European Court of Justice*, 16(6) European Law Journal 695 (2010), p. 697). The CJEU is well aware, though, of the traditional limits incumbent on a constitutional court according to the theory of separation of powers, as can be seen for example in the judgment of the Court of 29 March 2011, Case C-352/09 P *Thyssen Krupp Nirosta GmbH v. European Commission* [2011], ECR I-02359.

"more democracy" in the community system. Over time the judges of the Luxembourg Court have contributed directly to the configuration of a more solid institutional position for Parliament in the European government. In fact it is clear that the Court, in the debate on the state of democracy in the EU, finds its ideal referent in the role of Parliament. This is a sign, above all, of juridical continuity with the parliamentary traditions of the Member States of the European Community.[10]

The first major strand of EU case law involving the defence of the democratic principle has focused on the existence and the maintenance of institutional balance, analogously to what happens at the national level through the principle of separation of powers. The reasoning underlying this case law appears to be not so much the principle of separation of powers in the continental-Montesquieuian style – which if applied to the letter, in an almost mechanistic sense, would hardly be consistent with the real contexts of constitutional states, and much less of supranational organizations – but rather the Anglo-Saxon model, which sees this separation of powers as a sharing of the exercise of public power, as a mingling of checks and balances.[11]

a) The cornerstone of the case law on the subject, and a first step towards a jurisdictional guarantee of the democratic principle at the Community level, can be found in the well known ECJ decision concluding with the annulment of a regulation on the common norms for the production of isoglucose, based on the lack of consultations

[10] This last finding acts as well as a counterpoint to the well-known criticism regarding the excessive imbalance of the decision-making pole in the area specific to executive power – the so-called "executive dominance issue" – typical of organizations brought to life by an international Treaty and conflicting with the classical parliamentary system of government. In this sense, there is also a series of very interesting cases involving respect for the democratic principle within the walls of the EU parliamentary body itself, calling into question its internal organization and its independent character. Analysis of this strand of case law shows how the EU judges see a *continuum* between the common traditions of the Member States regarding parliamentary bodies and the European Parliament. According to the democratic principle, if the Parliament is the institution directly representing the peoples of Europe, their members should be able to exercise their mandate with all due guarantees. It is not possible to analyse this case law in this context. Suffice it to say that the first case of this strand is represented by the judgment of the Court of 29 September 1976, Case C-54/75 *Raphael De Dapper and others v. European Parliament* [1976], ECR 01381. *See also*, for example, the judgment of the Court of 23 April 1986, Case C-294/83 *Parti Ecologiste 'Les Verts' v. European Parliament* [1986], ECR 01339; the judgment of the Court of First Instance of 2 October 2001, Cases T-222/99, T327/99, T-329/99 *Jean-Claude Martinez, Charles de Gaulle, Front national and Emma Bonino and others v. European Parliament* [2001], ECR II-02823 (confirmed on the appeal by the CJEU in case C-486/01 P); the judgment of the Court of First Instance of 26 February 2002, Case T-17/00 *Willi Rothley and others v. European Parliament* [2002], ECR II-00579; and more recently the judgment of the Court of 21 October 2008, Cases C-200/07 and C-201/07 *Alfonso Luigi Marra v. Eduardo De Gregorio and Antonio Clemente* [2008], ECR I-07929; and the judgment of the Court of 6 September 2011, Case C-163/1 *Criminal Proceedings against Aldo Patriciello* [2011], ECR I-07565.

[11] *See also* G. Conway, *Recovering a Separation of Powers in the European Union*, 17(3) European Law Journal 304 (2011), p. 319. A general analysis of the principle of institutional balance as a systemic protection principle can be found in M. Chamon, *The Institutional Balance, an Ill-Fated Principle of the EU Law?*, 21(2) European Public Law 371 (2015).

with the European Parliament. This case was decided in 1979, the year of the first direct election of the European Parliament.[12] It is implicit in the tenor of the judges' affirmations with respect to the democratic principle that this historic and contemporary fact impacted upon the decision of the Court and its subsequent resolution of the case. If we consider also that the first EU official act in which the democratic principle was officially referred to was the Declaration on Democracy of the Council of Copenhagen (7-8 April 1978) – according to which "the election of the Members of the Assembly by direct universal suffrage is an event of outstanding importance for the future of the European Communities and a vivid demonstration of the ideals of democracy shared by the people within them"[13] – it may rightly be said that the end of the 1970s marked the advent of the democratic narrative in the EU system.

The Court's historic affirmation in the *Roquette Frères* judgment set forth the dominant refrain of the ECJ's cases in such matters, fundamentally based on two principal elements in the definition of democracy. They are evidently two sides of the same coin: On the one hand the necessary presence of Parliament within the legislative procedure as an element of institutional balance provided for by the treaties; and on the other hand, the participation of the people – through the parliamentary body – in the supranational decision-making process. To this classical conception, whereby a government is considered democratic to the extent its institutions are (at least in part) held accountable to the people in popular elections, the Court added a liberal-democratic theory. Accordingly, democracy is constructed on a sort of platform of reciprocal powers and control divided amongst individual governing bodies, thereby effecting a system of checks and balances.[14]

b) Along with the guarantee of a consultation procedure, the issue of the proper legal basis became another battlefield in the affirmation of the democratic principle at the Community level. Despite its apparently technical nature, in essence this issue provides another angle from which to re-establish the institutional balance provided for

[12] The case was de facto unique. There are two decisions, corresponding to two identical claims, one on behalf of Germany and one by France: Judgment of the Court of 29 October 1980, Case C-138/79*SA Roquette Freres v. Council of the European Communities* [1980], ECR 3333; and Judgment of the Court of 29 October 1980, Case C-139/79 *Maizena GmbH v. Council of the European Communities* [1980], ECR 3393.

[13] One can find the text of the Council of Copenhagen (7-8 April 1978) on the website http://aei.pitt.edu/1440/1/Copenhagen_1978.pdf (accessed 20 April 2016): the declaration specifies that the Member States "confirm their will to ensure that the cherished values of their legal, political and moral order are respected and to safeguard the principles of representative democracy, of the rule of law, of social justice and of respect for human rights. The application of these principles implies a political system of pluralist democracy which guarantees both the free expression of opinions within the constitutional organization of powers and the procedures necessary for the protection of human rights."

[14] It needs to be emphasized that the Court always speaks of balance (and not division of powers), precisely in order to clarify that within the Community an equilibrium takes place, implying *in primis* institutional cooperation rather than a subdivision of tasks. And, in fact, in the subsequent cases the Court went on to address this issue also as "loyal cooperation in inter-institutional relations", especially after the introduction of the new cooperation and co-decision legislative procedures.

by the Treaties, since opting for an *ad hoc* legal basis in order to avoid the intervention of Parliament would clearly violate what could be called the Community's "constitutional design". The choice of a proper legal basis thereby works as a sort of functional guarantee in the absence of other instruments of democratic control over the legislative process. This issue was first addressed in the *Titanium Dioxide* case of 11 June 1991,[15] but many cases followed which heightened the battle, and many amendments to the legislative procedures were added after these cases.

Case by case, reform after reform, the European Parliament gradually reinforced its position, thus again shifting the battlefield towards new frontiers. A relatively recent and new version of this evolution is reflected in the competences with respect to the Common Foreign and Security Policy (CFSP). In this sense the 2012 *Listing procedure* case[16] is insightful because it shows the new frontiers of what may be called the "democratic principle in institutional balance" case-law. In this case the European Parliament contested the legal basis chosen,[17] which led, as a side effect, to a restriction of the participation of the Parliament in the legislative procedure. In confirming the correct choice of the legal basis by the Council, the Court stated that the main difference between the two debated provisions, insofar as the Parliament's involvement was concerned, was the result of a choice made by the framers of the Treaty of Lisbon to confer a more limited role on the Parliament with regard to the European Union's action under the CFSP (para. 82).

This latter statement might puzzle a reader used to equating democracy with the recognition of Parliament's powers. How should we then assess the Court's statement according to the parameter of the democratic principle described above?

Judge Lenaerts tried to resolve the dilemma, observing that this decision – causing the exclusion of the European Parliament from the decision-making process in the field of CSFP – was not detrimental to the principle of democracy, but "on the contrary, by upholding the principle of institutional balance which militated in favour of protecting the prerogatives of the Council, the CJEU is paying due homage to representative democracy as defined in the Member States."[18] In simpler terms, this case confirmed the

[15] Judgment of the Court of 11 June 1991, Case C-300/89 *Commission of the European Communities v. Council of the European Communities* [1991], ECR I-02867. It is not by chance that this decision followed the course of another historical turn in European integration: the entry into force of the Single European Act in 1987 confirmed focus – taken up by the same Court of Justice – on reinforcing the democratic principle in European decision-making processes, as is evidenced by the adoption of the procedure of co-operation and the extension of the qualified majority voting within the Council. This is clearly the context in which the Court's *Titanium Dioxide* decision must be viewed.

[16] Judgment of the Court of 19 July 2012, Case C-130/10 *Parliament v. Council* [2012]. Interestingly, a similar issue involving the EP's role in the CFSP was resolved by the judgment of the Court of 24 June 2014 in the *Pirates* case, which dealt with the choice of the legal basis (Art. 218 of the Treaty on the Functioning of the European Union) and respect for the procedural rule of that provision: *see* Case C-658/11 *European Parliament v. Council of the European Union* [2014].

[17] More precisely, the issue at stake involved Art. 215 TFEU regarding Common Security Foreign Policy competences, instead of Art. 75 regarding the area of Freedom, Security and Justice.

[18] K. Lenaerts, *The Principle of Democracy in the Case-Law of the European Court of Justice*, 62(2) International and Comparative Law Quarterly 271 (2013), p. 285.

strong multi-level dimension of democracy within the EU framework, requiring that in certain matters, such as the CFSP, the democratic principle operated at the national level and in accordance with domestic rules. While it was not stated explicitly, the Court seemed to take cognizance of the fact that the type of competence at stake (foreign policy) is traditionally conferred on the executive power within the classic member states' separation of powers principle. Therefore we can recognize once again a juridical continuity between the two levels of governance.

Interestingly, the judgment also stresses that the duty to respect fundamental rights is imposed, in accordance with Art. 51(1) of the Charter of Fundamental Rights of the European Union, on all the institutions and bodies of the EU, thus assuring that fundamental rights are not left unprotected (para. 83). Thus it is not possible for the Parliament to assert the necessity of its participation in every act involving fundamental rights, since – from the Courts' perspective – the Charter of Nice already assures that kind of protection by every EU institution. No doubt this last observation could pave the way to new developments in the EU's institutional balance principle.

c) The identification of the democratic principle within the boundaries of institutional balance has thus far been sketched out very broadly. However, the CJEU judgment of 14 April 2015 (Case C-409/13) opens a new and vibrant chapter in this regard. The case concerned the Council's proposed action for annulment of the Commission's decision to withdraw its proposal for a framework regulation regarding macro-financial assistance to third countries. The Court of Luxembourg was thus called upon to resolve a new issue within the delicate and precarious institutional balance, i.e. the nature and limits of the Commission's exclusive power to withdraw a legislative act, taking into account recent practices that made the relations between the institutions more complex.

In fact, as is well known, this apparent impasse finds its full explanation in the Commission's powers, in particular in the exclusive legislative initiative power entrusted to it as part of the delicate institutional balance foreseen in the Treaties. The unique status of the Commission as a technical and independent body representing the interests of the European integration process was aimed, in the first phase of integration, at consolidating the Union's interests in the face of the strong and conflicting interests of Member States, which were intended to come together within the Council. Throughout the course of European integration this original intention and construct has not changed, and it still corresponds "to an original system of division of powers leading to decision-making processes which distinguish the European Union from any other State entity or international inter-governmental organisation. That method is therefore a *sui generis* characteristic of the supranational legislative mechanism established by the Treaties."[19]

[19] Opinion of Advocate General Jääskinen of 18 December 2014, Case C-409/13 *Council v. Commission*, para. 44. Starting from the Commission's capacity "as custodian of the general interest of the Union" (and its promotion of this latter), we can recognize "the main basis for conferring on it a power to withdraw a legislative proposal" (paras. 45 and 46).

At the same time, it is clear that this exclusive power "cannot, however, confer upon that institution a right of veto in the conduct of the legislative process, a right which would be contrary to the principles of conferral of powers and institutional balance."[20]

Accordingly, the CJEU on this occasion made it clear that the withdrawal of an act by the Commission requires not only a statement of the grounds forming the basis for its action, "which [grounds], in the event of challenge, have to be supported by cogent evidence or arguments" (para. 76), but also that prior to the withdrawal the Commission must have acted "having due regard, in the spirit of sincere cooperation which, pursuant to Article 13(2) TEU, must govern relations between EU institutions in the context of the ordinary legislative procedure, to the concerns of the Parliament and the Council underlying their intention to amend that proposal" (para. 83).

Without entering into the debate over this case in detail, it should be noted that the Court considered that neither the principle of institutional balance nor that of loyal cooperation had been violated. Accordingly, the judges sitting in Luxembourg dismissed the alleged violation of the principle of democracy, which – once again – is identified with the institutional balance within which the right of initiative (and withdrawal) of an act by the Commission has to be considered.

The above-mentioned case-law represents, albeit in brief, the way in which the Luxembourg Court has reinforced and delineated the position of the European Parliament within the "institutional balance" provided for in the Treaties. The representative democracy principle here described does not, however, fully explore its application to the diverse decision-making processes present in the EU system. While it is not possible in this context to analyse the new chapters in the development of the democratic principle, which imply the adjustment of democracy to a functional organization or a regulatory state – for example the role of administrative agencies[21] or procedures requiring a consensus by social partners[22] – suffice it to say that alongside the (more or less) classical parliamentary decision-making model, in specific cases the EU system recognizes some

[20] Judgment of the Court of 14 April 2015, Case C-409/13 *Council v. Commission* [2015] n.y.p., para. 75. This statement corresponds with the argument of the Council, according to which "recognition that the Commission has a discretion enabling it to withdraw a legislative proposal whenever it disagrees with the amendments agreed between the co-legislators or is not satisfied with the final outcome of negotiations would amount to granting it an unjustified means of exerting pressure on the conduct of legislative work and a right of veto over legislative action, on the basis of considerations of political expediency" (para. 36). This latter issue is clearly connected with the alleged violation of the democratic principle (para. 37).

[21] For very different reasons, the judgment of the Court of 24 January 2014, Case C-270/12 *UK and Northern Ireland v. European Parliament and Council of the European Union* [2014] (regarding the relative quasi-normative powers conferred to ESMA) and the two parallel cases regarding the notion of complete independence required by directive 95/46 of national administrative agencies processing personal data, are particularly interesting in this regard; *see* judgment of the Court of 9 March 2010, Case C-518/07 *Commission v. Germany* [2010], ECR I-01885 and judgment of the Court of 16 October 2012, Case C-614/10 *Commission v. Austria* [2012].

[22] The judgment of the Tribunal of the First Instance of 17 June 1998, Case T-135/96 *Union Européenne de l'artisanat et des petites et moyennes entreprises (UEAPME) v. Council of the European Union* [1998], ECR II-02335, concerning a first expression of participative democracy, is exemplary in this sense.

other special procedures to ensure that the approval of acts is consistent with the democratic principle.

1.2.2. Second strand of EU case law: The defence of the democratic principle through the principle of transparency

It is important to stress a second major strand in the series of cases elaborating on the meaning and application of the democratic principle. This strand represents the role played by the principle of transparency, with its corresponding right of access and principle of openness expressed in Art. 42 of the Charter of Nice and in the well known EU Regulation 1049/2001. This strand of case law completes the picture of the EU democratization process as elaborated by the Luxembourg Court.

In the first instance it needs to be recalled that a lack of transparency is indicative of a deficit whose roots are located elsewhere: in fact the emergence of this principle must be placed in the thorny dialectic between the internationalist roots of the Community system and its constitutional evolution. In other words, the internationalist (and also the functionalist) origin and nature of the EU order heavily influenced, at least in its initial stages, the limited transparency of the EU Community's governmental activity. Despite this, or perhaps because of it, the issue of transparency also greatly pertains to the EU democratic deficit, even if it represents just a symptom of it.[23]

So how, one may ask, is the issue of transparency strictly connected with the democratic principle? The answer is that greater transparency of government activity confers to the citizens the possibility of a more active and conscious participation in the EU *res publica* and, at the same time, is a prerequisite for controlling the same. As is well known, democracy is grounded not only on the representation of the people in the diverse public institutions, but also on the people's right to know about that government activity, thus enabling a form of control over it. For this reason the judges sitting in Luxembourg have made transparency a guiding principle of the EU democratization process, since it is viewed as completing the abovementioned framework of institutional balance and representative democracy at the EU level.

As constitutional law scholars have already asserted at the national level, with the diminishing role of traditional political accountability (*a fortiori* applicable at the supranational level), the right to know about government activity becomes the only kind of (political) diffuse control. More broadly, it is widely acknowledged that as representative democracy weakens, the instruments for citizens' participation in decision making have to be strengthened.[24]

While the case law on this principle is abundant and diverse, it always shows its close connection with the democratic principle, as is visible in the seminal case stressing the

[23] And as stated: "[w]hat is crucial is to cure the illness, not only its symptoms". H. Wallace, *Transparency and the Legislative Process in the European Union*, in: J. Rideau (ed.), *La transparence dans l'Union Européenne. Mithe ou principe juridique?*, LGDJ, Paris: 1998, p. 120.

[24] This issue, as always, reflects a difficulty present at national level as well. The crisis of parliamentarism, of political representation, etc., are problems faced by constitutionalists every day.

importance of the right of access to documents "in order to enable citizens to participate more closely in the decision-making process, to guarantee that the administration enjoys greater legitimacy and is more effective and more accountable to the citizen in a democratic system, and to contribute to strengthening the principles of democracy and respect for fundamental rights."[25] Indeed recent cases question the centrality of access to the acts of government in a system that strives for democracy.[26] Meanwhile, the Community legislature is currently undertaking to reform the historic Regulation 1049/2001, thus refining the procedure to access EU documents.

2. THE STRASBOURG COURT AND THE DEMOCRATIC PRINCIPLE

As already mentioned in the introduction to this article, the Preamble of the ECHR is very clear in establishing a close link between the democratic principle and human rights, affirming that fundamental freedoms "are best maintained on the one hand by an *effective political democracy* and on the other by … observance of human rights by which they [fundamental freedoms] depend." At the same time, however, the text of the Convention does not provide any significant clues as to the definition of the concept of "political democracy", and the ECtHR has, through its case law, contributed to the clarification of this notion only in an indirect and oblique way, unsurprisingly dealing more with what can be called the "individual" dimension of democracy than addressing the obvious political implications. While, as Susan Marks noted in a leading article on this issue, "[t]he Western liberal conception of a 'democratic society' gives a pre-eminent place to elections",[27] in fact electoral (and truly political) rights were included in

[25] Judgment of the Court of 6 March 2003, Case C-41/00 P *Interporc Im-und Export GmbH v. Commission of the European Communities* [2003], ECR I-02125, para 39; *see also* judgment of the Court of 6 December 2001, Case C-353/99 P *Council of the European Union v. Heidi Hautala* [2001], ECR I-09565.

[26] Judgment of the Court of First Instance of 14 December 2006, Case T-237/02 *Technische Glaswerke Ilmenau GmbH v. Commission of the European Communities* [2006], ECR II-05131(stating in para. 27 that "the right to access to documents…is not an ordinary secondary right but is, on the contrary, in view of the 'democratic principle', a fundamental right, derogation from which must be construed strictly"); judgment of the Court of First Instance of 8 November 2007, Case T-194/04 *Bavarian Lager Co. Ltd v. Commission of the European Communities* [2007], ECR II-04523; judgment of the Court of First Instance of 27 November 2007, T-3/00 and T-337/04 *Athanasios Pitsiorlas v. Council of the European Union and European Central Bank II* [2007], ECR II-04779; judgment of the Court of First Instance of 10 January 2006, Case C-344/04 *The Queen v. Department of Transport* [2006], ECR I-00403 (especially paras. 60-61); judgment of the Court of First Instance of 22 March 2011, Case T-233/09 *Access Info Europe v. Council of the European Union* [2011], ECR II-01073 and its appeal (judgment of the Court of 17 October 2013, Case C-280/11 P *Council of European Union v. Access Info Europe* [2013]); judgment of the Court of 21 July 2011, Case C-506/08 *Kingdom of Sweden v. European Commission and MyTravel Group plc.* [2011] I-06237.

[27] S. Marks, *The European Convention on Human Rights and Its "Democratic Society"*, 66 British Yearbook of International Law 209 (1996), p. 210.

the Convention only at a later stage through its First Protocol, and the case law of the ECtHR has traditionally been more concerned with the protection and enhancement of the core principles and conditions needed to ensure an "effective" democracy (i.e., freedom of expression, pluralism, public participation). In other words, the Strasbourg Court seems to have focused more on the "substantive" aspect of democracy, rather than attempting to define the concept of "political" democracy and exploring the "procedural" dimension thereof.[28] In this vein, it is possible to distinguish two different layers in the development of the case law of the ECtHR, which reveal an incremental but largely peace-meal attempt at construction of a coherent pattern of "substantive" democracy.

2.1. The "dual use" of the concept of democracy: fundamental "democratic" freedoms and limitations thereto arising out of "democratic necessity"

There is no denying that the early approach taken by the ECtHR towards the concept of "effective political democracy" mentioned in the Preamble of the Convention was a functional one – that is, one which attempted to identify and articulate those rights and freedoms which can be considered as vital components of democracy. In this sense, it can certainly be said that the Strasbourg Court has contributed to enhancing one of the original functions of the Convention, which was conceived by its drafters as a "code of law for the democracies" in Western Europe and as a safeguard for "the democratic way of life."[29] The approach of the Court in this respect emerged from the very first case in which freedom of expression, protected under Art. 10 of the Convention,[30] was singled out as one of the essential rights linked to democracy. In *Handyside*, which concerned an obscenity law, the Court felt itself obliged by its supervisory function to pay "the utmost attention" to the principles characterising a "democratic society" and held that "freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of

[28] We are here referring to the classical distinction between "substantive democracy" (*i.e.*, the view identifying democracy with a core of political rights ensuring effective public participation in the management of power) and "procedural democracy" (*i.e.*, the view claiming that democracy is guaranteed by a set of procedures for arriving at political decisions); and we suggest that the ECtHR case law is more inclined to explore the former dimension of concept. For an overview of the distinction between "procedural" and "substantive" democracy, *see* G.H. Fox, G. Nolte, *Intolerant Democracies*, in: G.H. Fox, B.R. Roth (eds.), *Democratic Governance and International Law*, Cambridge University Press, Cambridge: 2000, pp. 400-405; and for the problematic application of such a distinction in the ECtHR case law, *see* S. Sottiaux, S. Rummens, *Concentric Democracy: Resolving Incoherence in the European Court of Human Rights' Case Law on Freedom of Expression and Freedom of Association*, 10(1) International Constitutional Law Journal 106 (2012), pp. 106 *et. seq*.

[29] *See* the preparatory works of the Convention, as reported by Marks, *supra* note 27, pp. 210-211.

[30] According to Art. 10(1) of the ECHR: "[e]veryone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises."

every man."[31] Going beyond this mere statement of principle, the Court found that one of the basic conditions for the existence of a democratic society is the concept of *pluralism*, which is functionally linked to freedom of expression. The Court specified that freedom of expression is applicable not only to information or ideas that are favourably received or inoffensive, but also to those that offend, shock or disturb the state or any sector of the population, and considered that this outcome is demanded by "pluralism, tolerance and broadmindedness, without which there is no 'democratic society'."[32]

In its subsequent case law the Strasbourg Court enhanced the collective dimension of the linkage between freedom of expression and pluralism, for example by stressing that the "freedom of political debate is at the very core of the concept of the democratic society",[33] and paying special tribute to the unique importance of freedom of the press and the role of the media in guaranteeing the public access to information, transparency in the conduct of public affairs, and ultimately the accountability of public authorities.[34] While other individual rights – such as the fair administration of justice or the right to personal liberty and security – have occasionally been linked to the concept of a democratic society and to the democratic principle, the collective dimension of pluralism has been particularly explored by the Strasbourg Court with reference to Art. 11 of the Convention, protecting the freedom of assembly and association.[35] With respect to this provision the Court has produced a substantial body of case law elaborating on the freedom to form and maintain political parties, thereby further corroborating the link between effective political democracy and human rights set forth in the Preamble of the Convention. In one of the very first cases dealing with the power of the state to interfere with the existence of a political party, *United Communist Party of Turkey*, the Court forged one of its most accomplished elaborations on the concept of democracy. Starting from the well-established assumption that "there can be no democracy without pluralism", the Court underlined that the activities of political parties "form part of a collective exercise of freedom of expression", and concluded that political parties are thereby entitled to seek the protection offered by Arts. 10 and 11 of the Convention.[36] According to the Court, the rationale underlying this protection was also strengthened by "the irreplaceable contribution that political parties make to political debate, which is at the very core of the concept of a democratic society."[37] The implications of the

[31] ECtHR, *Handyside v. United Kingdom* (App. No. 5439), 7 December 1976, para. 49. All ECtHR judgments are available at http://www.echr.coe.int.

[32] *Ibidem*.

[33] ECtHR, *Lingens v. Austria* (App. No. 9815/82), 8 July 1986, para. 42.

[34] *See e.g.* ECtHR, *Castells v. Spain* (App. No. 11798/85), 23 April 1992, para. 46; ECtHR, *Observer and Guardian v. United Kingdom* (App. No. 13585/88), 26 November 1991, para. 59.

[35] Art. 11(1) ECHR read as follows: "[e]veryone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests."

[36] ECtHR, *United Communist Party of Turkey and Others v. Turkey* (App. No. 19392/1992), 30 January 1998, para. 43.

[37] *Ibidem*, para. 44.

latter reference to political debate were further developed in a later paragraph of the judgment, where the Court stated that "one of the principal characteristics of democracy [is] the possibility it offers of resolving a country's problems through dialogue, without recourse to violence even when they are irksome."[38] In short, once again pluralism emerges as the driving force behind the model of democratic society endorsed by the ECtHR. Based on this reasoning, in *United Communist Party of Turkey* the Court underscored that "[d]emocracy is without doubt a fundamental feature of the European public order" and that "the Convention was designed to maintain and promote the ideals and values of a democratic society", peremptorily concluding that "democracy thus appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it."[39]

However, if one goes beyond the principled references to pluralism, dialogue and public participation in the political debate, which political parties are assumed to promote, it becomes rather evident that the notion of democracy as defined in *United Communist Party of Turkey* is phrased more in negative than in fully positive terms. In fact, one of the key passages of the judgment – the same one quoted above claiming that democracy is the only political model contemplated by the Convention and compatible with it – also recognizes that the ECHR provides for the possibility of interferences by the state into the rights protected in Art. 10 (freedom of expression) and 11 (freedom of association), and that such interferences "must be assessed by the yardstick of what is 'necessary in a democratic society.'"[40] In this regard, the Court unambiguously assumes that "[t]he only type of necessity capable of justifying an interference with any of those rights is, therefore, one which may claim to spring from a 'democratic society'."[41]

The latter passage clearly enshrines one of the basic paradoxes accompanying the use of the democratic principle in the system of the ECHR: while the enjoyment and the protection of the rights and freedoms provided for in the Convention are assumed to be essential conditions for a democratic society as well as critical elements for the realisation of substantive democracy, at the same time the preservation of democratic institutions and principles may constitute a justification for placing restrictions on these protected rights. The two approaches taken together could be defined as the "democratic paradox" in the case law of the ECtHR. This paradox arises from the difficulty in defining the notion of democracy in any way other than on a case-by-case basis, i.e.

[38] *Ibidem*, para. 57.

[39] *Ibidem*, para. 45.

[40] *Ibidem*. While using different formulas and referring to different specific and legitimate aims, both the second paragraph of Art. 10 and the second paragraph of Art. 11 of the ECHR provide that no restrictions shall be placed on the exercise of the rights herein protected other than such as are prescribed by the law and are necessary in a democratic society for the protection of specific public or individual interests, such as national security and public safety, the prevention of disorder or crime, the protection of health or morals, or the protection of rights and freedoms of others, etc. For more on the scope and implications of such exceptional limitations, *see generally* D. Harris, M. O'Boyle, C. Warbrick, *Law of the European Convention on Human Rights* (3rd ed.), Oxford University Press, Oxford: 2014, pp. 504-520.

[41] ECtHR, *United Communist Party of Turkey*, para. 45.

through an assessment of the factual and specific circumstances in which interferences by the state with "democratic rights and freedoms" protected in the Convention may (or may not) be justified by the superior need to preserve the viability of a democratic society. It is therefore not surprising that, as observed by some prominent commentators with reference to Art. 10 ECHR, "the Court's case law is an attempt to strike the proper balance between these competing interests."[42]

In this regard it should be noted that while the recent case law of the Strasbourg Court has been able to develop a fairly well-structured test for assessing the legitimacy of state interference into the activities of political parties, its approach towards the definition of the content of democracy has nonetheless remained largely fragmentary. In *Refah Partisi*, involving a rather extreme situation in which a political party enjoying substantial popular support was dissolved by a decision of the Turkish Constitutional Court, the ECtHR applied a balancing method, referring to the impact of the political party's programme and activities on the principle of secularism, deemed to be an essential component of the democratic system in Turkey. In the end it considered the dissolution as "justified in a democratic society".[43] Of course, in this instance the Strasbourg judges were confronted with the most dramatic version of the paradox of "intolerant democracies",[44] arising from the fact that the very same associations considered by the Court as "essential to the proper functioning of democracy" – and for that reason worthy of protection under Art. 11 of the Convention – were deemed to be the source of activities threatening democracy and pluralism. In one important passage explicitly dealing with this issue, the Court in *Refah Partisi* held that:

> [i]n view of the very clear link between the Convention and democracy, no one must be authorised to rely on the Convention's provisions in order to weaken or to destroy the ideals and values of a democratic society. Pluralism and democracy *are based on a compromise that requires various concessions* by individuals or groups of individuals, who must sometimes agree to limit some of the freedoms they enjoy in order to guarantee greater stability of the country as a whole.[45]

On this basis, the Court engaged in a detailed evaluation of the circumstances of the case, aimed at verifying whether the timing and the grounds for the dissolution of the Refah Partisi were justifiable under the "democratic necessity clause" of Art. 11 ECHR, eventually holding the dissolution to be justified. One may also note that in reaching this conclusion the Court took due account of the exceptional importance of the principle of secularism for the viability of the democratic society in Turkey, as well as the "historical experience" of that country. Not surprisingly, "historical experience" is also acknowledged in general terms by the Court as a ground permitting each

[42] B. Rainey, E. Wicks, C. Ovey, *Jacobs, White & Ovey: The European Convention on Human Rights* (6th ed.), Oxford University Press, Oxford: 2014, p. 436.

[43] ECtHR (Grand Chamber), *Refah Partisi (The Welfare Party) and Others v. Turkey* (App. Nos. 41340/98, 41342/98, 41343/98 and 41344/98), 13 February 2003, para. 135.

[44] Fox & Nolte, *supra* note 28, pp. 389-392.

[45] ECtHR, *Refah Partisi*, para. 99 (emphasis added).

contracting state to oppose, in accordance with the Convention's provisions, political movements predicated on religious fundamentalism.[46] This may suggest that the concept of "democratic necessity" is a relative one, i.e. it has be tailored to the individual historical experiences of the country concerned. Be that as it may, one can hardly avoid the impression that the pattern of democracy emerging from the ECtHR case law considered so far represents the outcome of a piece-meal balancing process. This process is aimed at establishing, on a case-by-case basis, the outer limits under which interference by a state into the fundamental rights and freedoms essential for a democratic society can be justified.

2.2. The essence of the democratic principle: Democratic process, electoral, and "political" rights

One possible solution to the piece-meal approach to the concept of democracy described above could be to shift the analysis away from the substantive aspects of democracy to a focus on its inherent procedural requirements. This shift requires taking into account the scope of those fundamental rights and guarantees which are aimed at protecting the direct participation of individuals in the democratic process, above all the individual right to free elections. It is evident that this right goes directly to the very core of the concept of "political democracy" evoked in the Preamble of the ECHR.[47] In fact, the right to free elections involves both a negative obligation on the part of states to *not interfere* with certain fundamental rights considered to be essential for the democratic process, but also a positive obligation on the part of states to hold and organise free elections under conditions which will *ensure people's right to freely express their will* in the choice of public officers; therefore, the right to free elections is apt to call into question the electoral systems of states and the compatibility of their political systems with the democratic principles underpinning the Convention.

As is well known, the right to free elections is actually provided for in Art. 3 of the First Protocol to the ECHR (hereinafter Art. 3 FP).[48] However, the fact that this provision was agreed upon only two years after the adoption of the Convention and is worded in very cautious terms suggests how delicate the inclusion of the right to free elections in the ECHR system was. By way of illustration of the complexities accompanying the interpretation of this article, one can recall that in the context of the abovementioned *United Communist Party of Turkey* (a case properly touching on Art. 11

[46] *Ibidem*, para. 124: "[t]he Court must not lose sight of the fact that in the past political movements based on religious fundamentalism have been able to seize political power in certain States and have had the opportunity to set up the model of society they had in mind. It considers that, in accordance with the Convention's provisions, each contracting State may oppose such political movements in the light of its historical experience."

[47] Rainey, Wicks & Ovey, *supra* note 42, p. 537.

[48] Under the heading "Right to free elections", the text of Art. 3 FP is as follows: "[t]he High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

ECHR and the freedom of association protected under that provision) the Turkish Government took pains to underline before the Strasbourg Court that Art. 3 FP is the only provision of the Convention containing a reference to political institutions and does not confer any right on individuals, as it is worded so as to create obligations applicable only in the relationship between the contracting states.[49]

However, despite the ambiguities in the wording of Article 3 FP, the Court has been able to clarify in its case law that it confers rights that individuals may directly invoke against the state. In the very first case on the matter, *Mathieu-Mohin and Clerfayt*, the Court held that this provision involved subjective rights of participation in the electoral process, including both the "active" right to vote and the "passive" right to stand for election in the legislature.[50] In that same case, the Court also took care to specify that the rights conferred by the provision at hand are not absolute, and this notwithstanding the fact that Art. 3 FP does not contain exception clauses analogous to those contained in Arts. 10 and 11 ECHR. According to the Court, the fact that the provision recognises electoral rights without setting them forth in express terms, let alone defining them, leaves room for "implied limitations". This conclusion arises from the fact that in their internal legal orders the contracting states subject the right to vote and to stand for election to various conditions, which are not in principle precluded under Art. 3 FP, and thus they are deemed to enjoy a wide margin of appreciation in this sphere. Consequently, the Court only has to determine in the last resort whether the conditions placed on voting rights provided in the internal legislation of states curtail the rights in question to such an extent so as to impair their very essence and to deprive them of any effectiveness.[51]

This approach to the scope of Art. 3 FP was further clarified in the subsequent case law concerning the application of the right to free elections, both in the new democracies of Eastern Europe and in the more consolidated democracies of Western countries. The reasons for giving a wide margin of appreciation in this area to the state are well summarised in *Zdanoka v. Latvia*. In this case, after having qualified the rights guaranteed under Art. 3 FP as "crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law", the Court recognised that "there are numerous ways of organising and running electoral systems and a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought within Europe, which it is for each Contracting State to mould into its own democratic vision."[52] This reasoning seems to assume that the Court must refrain from reviewing the democratic visions of the contracting states and from using Art. 3 FP as a tool for imposing a particular type of electoral system on a state. More generally, the understanding of the Court with respect to the application of Art. 3 FP is that it demands flexibility, insofar as "[electoral] legislation must be assessed in the light of political evolution of

[49] ECtHR, *United Communist Party of Turkey*, para. 19.
[50] ECtHR, *Mathieu-Mohin and Clerfayt v. Belgium* (App. No. 9267/81), 2 March 1987, para. 51.
[51] *Ibidem*, para. 52.
[52] ECtHR, *Zdanoka v. Latvia* (App. No. 58278/00), Grand Chamber, 16 March 2006, para. 103.

the country concerned, with the result that features unacceptable in the context of one system may be justified in the context of another."[53] However, the admission that individual contracting states may, in the application of the right to free elections, rely on individual democratic visions tailored to their own historical experiences and to their own political evolution seems to reduce to a bare minimum the possibility of identifying some general or common pattern in the democratic process. As a result of this relativized approach, the supervisory role of the Court seems to be limited to verifying that the conditions imposed by the state on the individual enjoyment of electoral rights "do not thwart the free expression of the people in the choice of the legislature" and reflect "the concern to maintain the integrity and the effectiveness of an electoral procedure aimed at identifying the will of the people through universal suffrage."[54] Correspondingly, the test developed by the Court in examining whether a violation of Art. 3 FP has taken place is focused on two criteria – legitimacy, i.e. the existence of a legitimate aim for interfering with the free expression of the people; and the proportionality of the interference – while the traditional exceptions of "necessity" or "pressing social needs" provided for in the context of Arts. 10 and 11 are not applied.[55]

At first glance it may appear puzzling that the exception clause of a "democratic necessity" does not appear in the context of a provision assumed to be critical for guaranteeing the participation of people in the democratic process, and that the discretion of states in limiting electoral rights is accordingly enlarged. This however should not come as a surprise, insofar as we are dealing with some of the basic tenets of state sovereignty and domestic jurisdiction, i.e., the organisation of electoral processes and the choice of political systems, in the face of which the ECHR system has to show obeisance.

Regardless of how one interprets the prevailing doctrine, an overview of the relevant case law confirms that the Court has never used the "implied limitations" associated with Art. 3 FP as a means to assess the overall democratic legitimacy of any electoral system adopted by ECHR contracting states. So long as a state's electoral process respects some minimum standards below which the democratic validity of an election would be undermined – such as the principle of universal suffrage – the Court has conceded that Art. 3 FP "does not create any 'obligation to introduce a specific system', such as proportional representation or majority voting with one or two ballots."[56] Based on this understanding the "implied limitations" test has been employed by the Court to verify the conformity with Art. 3 FP of some specific aspects of electoral laws of the contracting parties. For example, the Court verified whether the legal requirements governing the exercise of electoral rights were sufficiently precise, accessible and clear for participants;[57] qualified as unfair and arbitrary the way in which the outcome of elections was reviewed

[53] *Ibidem*, para 115.

[54] *See* ECtHR, *Hirst v. United Kingdom (no 2)* (App. No. 74025/01), Grand Chamber, 6 October 2005, para. 62.

[55] *See* ECtHR, *Mathieu-Mohin and Clerfayt*, para. 52; ECtHR, *Zdanoka*, para. 115 (c).

[56] ECtHR, *Yumak and Sadak v. Turkey* (App. No. 10226/03), Grand Chamber, 8 July 2008, para. 110.

[57] ECtHR, *Grosaru v. Romania* (App. No. 78039/01), 2 March 2010, para. 51.

by the state;[58] and censured as contrary to Art. 3 FP a law applying an automatic blanket voting ban on convicted prisoners.[59]

At the end of the day, it seems that when considering the procedural dimension of the democratic principle the ECtHR has also refrained from elaborating a comprehensive notion of democracy. Instead the Strasbourg judges have chosen to indulge in the same casuistic, piece-meal approach already developed with reference to Arts. 10 and 11 of the Convention.

CONCLUSIONS: DEMOCRACY AND EUROPEAN SUPRANATIONAL COURTS – DIFFERENT PATTERNS BUT SIMILAR PATHS?

At the end of this survey of the relevant case law, one can legitimately have the impression that there are more divergences than convergences in the two European Courts' elaboration of the democratic principle, and that in this area we are comparing (or mixing) apples and oranges. This rather stark conclusion seems to also have some validity above and beyond the very different perspectives and mandates under which democratic questions are traditionally approached by the two Courts. As we pointed out in the introduction to the present article, the CJEU has been especially focused on the institutional implications of the democratic principle in the internal setting of the EU, while the ECtHR has been mostly concerned with the impact of democratic principles on enhancing or restricting individual fundamental rights, as conceived and applied in the Member States. In addition, recent developments also suggest that when the two Courts have to cope with similar or like problems, the distance between their approaches can be dramatic. One need devote no more than a cursory examination of the recent CJEU judgment in the *Delvigne* case,[60] in which the EU Court dealt for the first time with the thorny issue of detainees' right to vote, and compare it with ECtHR's case law consolidated after the *Hirst* case,[61] to note how far apart the approaches undertaken by the two Courts remain, especially as to the implications of the democratic principle on this issue.[62] However, even while admitting that on the same crucial issue

[58] ECtHR, *Hajili v. Azerbaijan* (App. No. 6984/06), 10 January 2012, para. 57.

[59] ECtHR, *Hirst*, paras. 76 ff.

[60] See judgment of 6 October 2015, Case C-650/13 *Thierry Delvigne v. Commune de Lesparre-Médoc, Préfet de la Gironde* [2015].

[61] *See* ECtHR, *Hirst*; *see also*, *inter alia*, ECtHR, *Greens and M.T. v. the United Kingdom* (App. Nos. 60041/08 and 60054/08), 23 November 2010; ECtHR, *Frodl v. Austria* (App. No. 20201/04), 8 April 2010; ECtHR, *Scoppola v. Italy* (App. No. 126/05), 22 May 2012; ECtHR, *Murat Vural v. Turkey* (App. No. 9540/07), 21 October 2014. For a recent perusal of the detainees' right to vote saga before the ECtHR, *see* A. Mowbray, *Contemporary Aspects of the Promotion of Democracy by the European Court of Human Rights*, 20(3) European Public Law 469 (2014), pp. 491-494.

[62] In fact, the CJEU's ruling in the *Delvigne* case has been criticized as an expression of a "self-contained case law" on the issue of detainees' voting rights: *see* P. Pustorino, *Detainees' Right to Vote between CJEU and ECtHR case-law*, in SIDIBlog (blog of the Italian Society of International Law), 6 November 2015, available at www.sidi-isil.org/sidiblog/?p=1620 (accessed 20 April 2016).

the recent solution offered by the CJEU is at odds with with that of the ECtHR, a substantial point of convergence on the idea of democracy seems nevertheless to be taking place. This is visible in the very short passage whereby the CJEU endorses the view that Art. 39(2) of the EU Charter of Fundamental Rights (providing that Members of the EU Parliament shall be elected by direct universal suffrage in a free and secret ballot) "takes over the basic principles of the electoral system in a democratic State."[63] In other words, it can be maintained that the two Courts share a common core concept of democracy and that the differences in their approaches to the democratic principle are more of degree than of substance.

Keeping this in mind, we can try to identify some common threads influencing the understanding of the democratic principle in the case law of the two Courts.

One must begin by stating the obvious – that courts, strictly speaking, do not take part in the democratic process. On the contrary, as is well known in constitutional law theory, they are viewed as counter-majoritarian institutions aimed at balancing democratic institutions' powers in specific instances. Courts are called to step into the democratic process in cases of an allegation of breach of the democratic principle. Accordingly, what judges see of democracy is mostly its pathology. Needless to say, democracy is much more than its mistaken application. We should add that it is much more refined and complex than a particular violation at stake may itself demonstrate. Hence the Courts' judgments are necessarily created within the restricted borders of a specific violation; they are not only restricted but also, in a certain sense, one-sided. And in the end one could also speculate whether it is even possible to *judge* democracy.

Thus the first matter we must draw attention to is the *case by case* (or violation by violation) nature of the supranational Courts' intervention. This could seem obvious, given the structure of these institutions. However, following on our previous remarks about the ECtHR and CJEU case law, we feel compelled to add something to this observation: Yes, Courts do not (and cannot) judge/define democracy – therefore we cannot identify patterns of democracy in the classical terms of political science theory. But they do say what is *not* democratic, thus pointing out some basic traits of the democratic principle, the absence of which would divest democracy of its meaning. Hence, after this journey through the relevant ECtHR and CJEU case law on the issue we can begin to draw the boundaries of the unique landscape surrounding the application of the democratic principle in Europe.

There is a second, more general, reason bearing on the rather mixed and controversial picture concerning the contribution of the European Courts to the realization of the democratic principle. We are not discussing "judiciary and democracy" in the traditional domestic perspective, but we are addressing them in the supranational and international context, i.e. in legal orders where democracy was not – at least at the very beginning – foreseen. What we are witnessing is, accordingly, the gradual emergence of some traits of democracy within supranational and international systems. A comparison

[63] CJEU, *Thierry Delvigne*, para. 41.

of these traits with those of national systems is not always recommended, even if we can vividly recognize the influence of domestic constitutional traditions in the ECtHR and CJEU case law. At the same time, this comparison could account for the impoverished semblance of democracy in the supra- and international context, which can give us pause whether we are discussing the same democratic principle present in European constitutionalism or something else altogether. This special context shapes the possible patterns of democracy. By their very nature supranational courts have to combine different models of democracy, brought into play by the interaction of a multi-level system. Even if the constitutional model which we can trace back to the common constitutional traditions of European states is the prevailing model in the case law analysed, one cannot underestimate the fact that the Courts in question are not constitutional but supranational courts, i.e. created by and governed by the international law system. Furthermore, in the case of the CJEU one has also to keep in mind another original feature – the EU's functional structure.

In summing up this second point we should further underscore that the context of the present case law is extremely relevant, placing the debate over democracy in a new legal environment, which will inevitably lead to a sort of fine-tuning of the principle at stake.

There is a third feature which characterises this case law, strictly linked with the previous statement – and this is the evolutionary nature of the case law development. It is not really a question of its step-by-step character, which again states the obvious given that we are dealing with cases. Rather, it is a kind of additive process. It is a gradual achievement – international law blending in with the classical foundations of domestic constitutional law and incorporating its basic elements as its own. This is not the right place to discuss the mutual process of contamination and mutation between international and constitutional law. However, once one accepts that such a process is underway, it would be difficult to exclude the democratic question from it.

At the end of the day, what stands out in this analysis is the emergence of a quiet process led by supranational courts, in which the application of the democratic principle results in multiple grades and variations. It is, as we have stated, an arduous and difficult task to draw general patterns from this case-law. What we are already witnessing, though, is a steady endorsement of a common path towards the elaboration of this principle in the supranational judicial framework. Even if it is not "love at first sight",[64] international integration and democracy are getting to know each other (much) better. Perhaps we are not yet at the beginning of a radical "mutation of the old international legal system",[65] but some things are definitely changing.

[64] E Stein, *International Integration and Democracy: No Love at First Sight*, 95 American Journal of International Law 489 (2001).

[65] J.H.H. Weiler, J.P. Trachtman, *European Constitutionalism and its Discontents*, 17 Northwestern Journal of International Law & Business 393 (1997).